***United States Court of Appeals***

***for the Second Circuit***


# RESPONDENT'S BRIEF

w/affidavit

# 75-4159

*To be argued by*
THOMAS E. MOSELEY

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket Nos. 75-4159, 75-4160**

MARIA PAZ DE FERNANDEZ and
JUAN FRANCISCO FERNANDEZ-BLENGIO,
*Petitioners,*

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
*Respondent.*

P
P/C

ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

## BRIEF OF RESPONDENT


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## CASES CITED

## ISSUE PRESENTED

WHETHER THE BOARD OF IMMIGRATION APPEALS ABUSED ITS DISCRETION BY DECLINING TO REOPEN PETITIONERS' DEPORTATION PROCEEDING IN ORDER TO PERMIT PETITIONERS TO APPLY FOR WITHHOLDING OF DEPORTATION

## STATEMENT OF THE CASE

Pursuant to Section 106 of the Immigration and Nationality Act, (the "Act") 8 U.S.C. §1105a, Maria Paz de Fernandez and her husband, Juan Francisco Fernandez-Blengio have petitioned this Court for review of an order of the Board of Immigration Appeals (the "Board") dated June 26, 1975. In that order, the Board, after a review of the entire record, affirmed the Immigration Law Judge's denial of petitioners' motion to reopen their deportation proceedings in order to apply for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. §1253(h).

## STATEMENT OF FACTS

Maria Paz de Fernandez and Juan Francisco Fernandez-Blengio are natives and citizens of Uruguay. They entered the United States on or about October 12, 1969 as non-immigrant visitors and were authorized to remain in the United States until October 12, 1970 (8a)*. Petitioners, however,

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*References are to pages in the Appendix to Petitioners' Joint Brief.

stayed in the United States beyond their authorized period and on April 18, 1973 deportation proceedings were commenced against them by order to show cause (8a).

At their deportation hearing on August 31, 1973, where petitioners were represented by counsel, they conceded their deportability and were given the privilege of voluntary departure provided they depart on or before February 28, 1974(7a). In the alternative, the Immigration Law Judge entered an order of deportation in the event petitioners did not depart voluntarily by the specified time.

On February 21, 1974, petitioners submitted to the District Director an application for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. §1253(h)(3a) and subsequently moved to reopen their deportation proceedings (9a) on this basis. At their original deportation hearing, petitioners, by counsel, had specifically declined any request under Section 243(h) and merely expressed concern about alleged turmoil in Uruguay while reserving the right to apply for relief under Section 243(h) if Uruguay's Government became Communist

(5a). Petitioners' submission of February 21, 1974 stated only their belief that they would be persecuted by the "Tupamaros, a leftist group" (3a), should they be compelled to return to Uruguay.

In 1969, according to petitioners, two strangers attempted to buy a house that the couple was constructing; and when petitioners refused to sell to the strangers they harassed and abused the petitioners (11a)*. Later, so petitioners maintained, they discovered that the house behind the one they were constructing was owned by the Tupamaros and the Tupamaros wanted petitioners' house for "expansion purposes" (11a). Despite this, petitioners stated that they did not seek protection from the authorities because "everyone appeared to be a terrorist"(11a).

In accordance with established procedure, the District Director obtained the comments of the Department of State with respect to petitioners' claims. Those comments reflected in the letter of March 7, 1975 from the Department of State, Office of Refugee and Migration

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*This information, obtained by the District Director through a duly conducted interview of the petitioners, is reflected in the record in the letter from the Department of State, Office of Refugee and Migration Affairs (11a-12a) to the District Director commenting on petitioners' application.

Affairs pointed out that the Uruguayan Government was hardly friendly to the Tupamaros and that that organization had "been largely decimated in recent years" (12a). Furthermore the letter stated that there was no reason to believe petitioners would be persecuted by the Government of Uruguay or that they would be harmed by the Tupamaros for events that had occurred in 1969.

On the basis of this record, the Immigration Law Judge denied petitioners' motion to reopen on May 5, 1973 noting that their affidavit, which reflected information that could have been presented at the original deportation hearing, was the only evidence presented in support of this motion 2(a)*. The board affirmed this decision on June 26, 1975 stating that

> "[W]e do not find that the respondents have made a prima facie showing that they have a well-founded fear of persecution in Uruguay on account of race, religion, nationality, membership of a particular social group, or political opinion (1a)."

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*The Immigration Law Judge had before him the March 7, 1975 letter from the State Department which constituted a part of the administrative record. The Judge's statement that only petitioners' "affidavit was submitted to support the motion (2a)," quoted in a misleading fashion by Petitioners' Joint Brief at 5, hardly suggests anything to the contrary. Certainly the Department of State's letter did not support petitioners' motion to reopen.

## RELEVANT STATUTE

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 243(h), 8 U.S.C. §1253(h):

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

## RELFVANT REGULATIONS

Title 8, Code of Federal Regulations (C.F.R.):

Section 103.5 Reopening and Reconsideration:

> * * * A motion to reopen shall state the new facts to be proved at the reopened proceeding and shall be supported by affidavits or other evidentiary material.* * *

Section 242.22 Reopening and Reconsideration:

> * * *A motion to reopen will not be granted unless the [Immigration Law Judge] is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing. * * *

## ARGUMENT

### THE BOARD OF IMMIGRATION APPEALS DID NOT ABUSE ITS DISCRETIONARY AUTHORITY IN DECLINING TO REOPEN THE DEPORTATION PROCEEDING TO PERMIT PETITIONERS TO APPLY FOR WITHHOLDING OF DEPORTATION

#### A. The reopening of a deportation proceeding is a matter of discretion.

The Immigration and Nationality Act contains no specific provision for the reopening of a deportation proceeding. The Attorney General, under his broad grant of authority to administer and enforce the Act*, has promulgated regulations which permit reopening as a matter of discretion provided certain criteria are met. Thus, 8 C.F.R. §242.22 provides that a motion to reopen "will not be granted unless the [Immigration Law Judge] is satisfied that the evidence sought to be offered is material and was not available and could not have been presented at the hearing...." Additionally, 8 C.F.R. §103.5 provides that a "motion to reopen shall state the new facts to be proved at the reopened proceeding and shall be supported by affidavits or other evidentiary material**."

*Section 103(a) of the Act, 8 U.S.C. §1103(a).

**Nothing in these regulations suggests that they were not intended to apply to motions to reopen in order to present a claim under Section 243(h) and the Operations Instructions in effect when petitioners made their motion give no indication that such a motion should not be subject to 8 C.F.R. §§103.5 and 242.22, despite petitioners' unsupported assertions to the contrary. Petitioners' Joint Brief at 5.

In other words, the regulations contemplate that a motion to reopen will contain an offer of evidence not previously obtainable and that the evidence, if true, will, in effect, be sufficient to warrant a grant of the relief sought. When the proffered evidence will not justify a grant of the ultimate relief sought, then no legitimate purpose would be served by reopening the proceeding and holding a hearing.

Thus, the mere filing of a motion to reopen does not entitle the applicant to a reopened hearing and it is certainly no violation of procedural due process to deny a motion to reopen without a hearing.* Cheng Kai Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

B. The standard for withholding of deportation under Section 243(h) of the Act.

Turning from the criteria governing a motion to reopen to petitioners' underlying claim for relief pursuant

*The language from 8 C.F.R. §108.2 relied on in Petitioners' Joint Brief at 4, suggests nothing to the contrary for motions to reopen such as petitioners' since the quoted passage merely confirms that a claim under Section 243(h) can be presented during a deportation hearing but says nothing about any putative right to reopen a deportation hearing in order to present a claim under 243(h).

to Section 243(h) of the Act, 8 U.S.C. §1253(h), the language of that section authorizes the Attorney General* to withhold deportation when "in his opinion the alien would be subject to persecution on account of race, religion, or political opinion." As an applicant for this statutory benefit, the alien has the burden of establishing that he warrants the favorable exercise of discretion. 8 C.F.R. §242.17(c); Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968). The statute requires a showing not only that the alien concerned is likely to be persecuted in the country of deportation, but that such persecution will be imposed for religious, racial or political reasons. Moreover, this Circuit has determined that only where there is a clear probability of persecution to the particular alien is this discretionary authority to be favorably exercised. Cheng Kai Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

C. The petitioners offered no evidence which warranted reopening.

The only evidence petitioners offered in support of their motion to reopen was a short affidavit which, in

*The Attorney General has delegated his authority to the Immigration Law Judge, 8 C.F.R. §242.8(a) and to the Board of Immigration Appeals, 8 C.F.R. §3.1.

conclusory fashion, stated their belief that they would be persecuted by Tupamaros if forced to return to Uruguay. This evidence, relating back as it does to incidents occurring in 1969, could easily have been presented at petitioners' original hearing. Indeed, petitioners' counsel at the hearing broached the subject of Uruguay's alleged domestic turmoil, but specifically declined to make an application under Section 243(h). In sum, the fact that the proffered evidence was hardly unobtainable at the time of the prior hearing would alone justify the Immigration Law Judge's denial of petitioner's motion and even the hearing itself makes clear that petitioners' claim could have been presented during the original hearing.

Furthermore, the petitioners' conclusory statements gave no indication that they would be persecuted on account of race, religion or political opinion, which is required for a withholding of deportation under Section 243(h). Their fear of the Tupamaros apparently arises out of events that took place in 1969. Yet, even then, it was unclear that these incidents involved the Tupamaros. Moreover, as the Department of State's letter points out, it is highly unlikely that this decimated group would harass the petitioners based on events that occurred more than six years ago.

Finally, petitioners offered no evidence to show that the Government of Uruguay could not protect them from the Tupamaros or that they had sought such help and had been refused. As the Department of State letter pointed out, the Government of Uruguay is hardly an ally of the Tupamaros. In short, petitioners should not be entitled to reopen their deportation proceeding by merely raising the highly speculative possibility of their involvement in civil turmoil if they are deported; nor should the almost negligible chance that the Tupamaros might gain control of Uruguay be a basis for requiring petitioners' deportation proceeding to be reopened. Thus, Cheng Kai Fu v. Immigration and Naturalization Service, supra, sustained the denial of a similar motion to reopen where the petitioners, who faced deportation to Hong Kong, claimed that they were anti-Communists, that the situation in Hong Kong was worsening and that the British Crown Colony would eventually fall to the Chinese Communists. That evidence, this Court held, was simply too speculative to require reopening; nor could the imminence of a Communist takeover be assumed because of recent turmoil.

Similarly, petitioners' claims here are far too speculative to require a reopening.

D. There was no abuse of discretion in the denial of petitioners' motion to reopen their deportation proceeding.

To reiterate, the grant or denial of a motion to reopen is purely discretionary. See, e.g., Novinc v. Immigration and Naturalization Service, 371 F.2d 272 (7th Cir. 1967). Thus, the scope of judicial review is limited solely to whether there has been an abuse of discretion. Muskardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969). Where, as here, the evidence offered by petitioners not to mention the entire administrative record provides no support for the grant of the relief sought, the denial of a motion to reopen is not an abuse of discretion. Cheng Kai Fu v. Immigration and Naturalization Service, supra.

## CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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Of Counsel

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 75-4159

State of New York )
County of New York ) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2

1st day of March, 1976 she served ~~a~~ copysof the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Claude Henry Keefield, Esq.,
Suite 400,
100 West 72nd St.
NY NY 10023

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

1st day of March, 1976

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977